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Chen Boon Kwee v Berjaya Sompo Insurance Bhd

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-32–04 OF 2023(J)
ZABARIAH YUSOF, HANIPAH FARIKULLAH AND VAZEER ALAM FCJJ
14 NOVEMBER 2024

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Insurance — Motor insurance — Insurer's liability to satisfy judgment — Husband travelling as passenger in wife's insured car suffered injuries when car collided with lorry — Husband was on assignment ordered by his employer — Sessions court found car driver and owner 100% liable and awarded damages — Insurers refused to pay judgment sum on ground policy did not cover passenger liability and contended that husband should file separate suit against them to recover judgment sum — Whether law was established that separate recovery suit against insurer was unnecessary — Whether insurers had never applied to declare policy void or unenforceable under s 96(3) Road Transport Act 1987 ('the RTA') — Whether exception of liability in policy did not apply as husband was injured while travelling in insured vehicle pursuant to contract of employment — Whether 'contract of employment' in s 91(1)(b)(bb) RTA referred to any contract of employment and not just with insured — Whether insurers were compulsorily required by s 96(1) RTA to pay husband the judgment sum

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The respondent had issued a third-party risk motor insurance policy ('the policy') for a car owned by Tan Saw Kheng ('TSK') who was the wife of the appellant. The appellant worked at the material time for an aquaculture company. On a particular day, the appellant's employer instructed him to go to the company's hatchery to carry out an insurance audit. TSK authorised the appellant's work-mate ('Masri') to drive the appellant in the insured vehicle to the hatchery. While they were on their way, the vehicle collided with a lorry and the appellant was injured. The appellant jointly sued the owner and driver of the lorry as well as Masri and TSK in the sessions court for damages for negligence. Following a full trial, the sessions judge held Masri fully liable for the accident and also held TSK vicariously liable as Masri was her authorised agent at the material time. Following assessment and award of damages, the appellant looked to the respondent for settlement thereof under s 96(1) of the Road Transport Act 1987 ('the RTA'). The respondent, however, took the position that as TSK had not bought additional insurance to cover passenger liability, it was not liable to settle the judgment sum. The respondent applied to the High Court for an order that pursuant to s 91(1)(b)(bb) of the RTA, it was not liable to settle the judgment sum unless the respondent was held liable under a separate recovery suit filed by the appellant wherein the issues of the

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construction of the terms of the policy and the application of ss 91 and 96 of the RTA could be ventilated and decided. The Court of Appeal affirmed the High Court's decision. In the instant appeal, the issues that required determination were: (a) whether s 91(1)(b)(bb) of the RTA absolved the respondent from having to settle the judgment sum under s 96(1); (b) whether the appellant could rely upon s 96(1) of the RTA to enforce the sessions court's judgment directly against the respondent without having to file a separate recovery action against it; and (c) whether the respondent's failure to obtain a prior declaration under s 96(3) of the RTA that the policy was void and/or unenforceable precluded it from avoiding liability to settle the sessions court's judgment under s 96(1) of the RTA.

Held, unanimously allowing the appeal, setting aside the decisions of the courts below and granting the appellant liberty to enforce the sessions court's judgment against the respondent:

(1) Following the dicta of the Federal Court in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825 and *Pacific & Orient Insurance Co Berhad v Yeap Tick In* (Appeal No 6 in *AmGeneral*) read with *Malaysian Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440, a third party victim of a road accident was not required to file separate recovery proceedings against the insurer of the vehicle-owner to recover the judgment sum ordered in the tortious action between the third party and the insured (see para 42).

(2) If the insurer wished to challenge its liability to pay on grounds that the claimant did not fall under the class of persons listed in s 91(1)(b) of the RTA or that the policy was void or unenforceable, the insurer had to obtain a timely declaration binding the third party in accordance with s 96(3) of the RTA before the liability judgment was entered. Alternatively, the insurer should seek to intervene in the tortious liability suit and have the policy liability issue determined at the trial of the action. Absent that relief, the insurer's liability to pay was immediate as s 96(1) of the RTA made it mandatory for the insurer to make payment after judgment had been obtained against the insured by the third party claimant (see para 43).

(3) The statutory third party insurance scheme in Part IV of the RTA was a piece of beneficent social legislation. As such, any legitimate claim of a third party for death or injury sustained from a road accident involving an insured vehicle must be resolved expeditiously and without the need for protracted litigation or excessive legal costs. Hence, the necessity to determine the tortious claim as well as the insurer's denial of liability, if any, without undue delay or the need for a recovery action that would add further costs and prolong the ultimate resolution of the third party's claim for compensation (see para 44).

(4) Running-down cases comprised the bulk of the subordinate courts' civil case load and the addition of another tier of unnecessary adjudicatory process in the form of recovery action was wholly unwarranted. The court's finite resources could be put to better use if such proceedings were done away with and the legal process was done fairly and efficiently to all parties, be it the third party victim, the insured tortfeasor or the insurer, and ensure that justice was done (see para 44).

(5) Section 91(1)(b)(bb) of the RTA did not operate to exclude the respondent's statutory liability under s 96(1) of the RTA to indemnify TSK and pay the appellant the sum in the sessions court judgment. The words 'other than a passenger carried by reason of or in pursuance of a contract of employment' found in para (d) of the Exception to Section B in the policy, and which was a mirror reflection of the words in s 91(1)(b)(bb) of the RTA, did not merely refer to persons employed by the insured or the insured's authorised driver but also to any person being carried in pursuance of a contract of employment with some other third party employer. The evidence taken at the sessions court in the liability suit showed clearly that the appellant was not on a frolic of his own whilst travelling in the insured vehicle, nor was he out on a family trip as a member of the insured's household. On the contrary, he was a passenger in the vehicle pursuant to a contract of employment with the aquaculture company at the time of the accident. Hence, the appellant ought not to be treated differently from any other 'third party' victim who had obtained a judgment against the insured in respect of injuries sustained in a motor vehicle road accident (see paras 67–68 & 70).

(6) Section 91(1)(b) and proviso (bb) of the RTA protected third party accident victims who travelled in an insured motor vehicle pursuant to a contract of employment. Any such passenger was intended by Parliament to be a 'third party' which the RTA protected. Since the appellant had established that he was travelling in the insured vehicle pursuant to a contract of employment, the respondent as insurer was bound by s 96(1) and 91(3) of the RTA to satisfy the judgment which the appellant had obtained against the insured (see para 65).

[Bahasa Malaysia summary

Responden telah mengeluarkan polisi insurans motor pihak ketiga ('polisi tersebut') untuk kereta milik Tan Saw Kheng ('TSK') yang merupakan isteri perayu. Pada masa material, perayu berkerja untuk sebuah syarikat akuakultur. Pada hari kejadian tersebut, majikan perayu mengarahkannya pergi ke pusat penetasan syarikat untuk menjalankan audit insurans. TSK memberi kuasa kepada rakan sekerja perayu ('Masri') untuk memandu perayu dalam kenderaan yang diinsuranskan ke pusat penetasan tersebut. Semasa mereka dalam perjalanan, kenderaan itu bertembung dengan sebuah lori dan perayu mengalami kecederaan. Perayu menyaman pemilik dan pemandu lori dan juga

Masri dan TSK di mahkamah sesyen untuk ganti rugi kecuaian. Selepas perbicaraan penuh, hakim sesyen memutuskan Masri bertanggungjawab sepenuhnya atas kemalangan itu dan juga menganggap TSK bertanggungjawab secara bersesama kerana Masri adalah ejen yang diberi kuasanya pada masa itu. Berikutan penilaian dan pemberian ganti rugi, perayu berunding dengan responden untuk penyelesaian menurut s 96(1) Akta Pengangkutan Jalan 1987 ('APJ'). Responden bagaimanapun, mengambil pendirian bahawa kerana TSK tidak membeli insurans tambahan untuk melindungi penumpang dan tidak bertanggungan untuk menyelesaikan jumlah penghakiman tersebut. Responden memohon kepada Mahkamah Tinggi untuk perintah menurut s 91(1)(b)(bb) APJ bahawa mereka tidak bertanggungan untuk menyelesaikan jumlah penghakiman melainkan responden bertanggungan di bawah saman berasingan yang difailkan oleh perayu di mana isu-isu pentafsiran terma polisi dan peruntukan ss 91 dan 96 APJ diputuskan. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi tersebut. Dalam rayuan ini, isu-isu untuk penentuan adalah: (a) sama ada s 91(1)(b)(bb) APJ mengecualikan responden dari menyelesaikan jumlah penghakiman di bawah s 96(1); (b) sama ada perayu boleh bergantung kepada s 96(1) APJ untuk menguatkuasakan penghakiman mahkamah sesyen secara langsung terhadap responden tanpa perlu memfailkan saman berasingan terhadapnya; dan (c) sama ada kegagalan responden untuk mendapatkan pengisytiharan terdahulu di bawah s 96(3) APJ bahawa polisi itu tidak sah dan/atau tidak boleh dikuatkuasakan menghalangnya daripada mengelakkan liabiliti untuk menyelesaikan penghakiman mahkamah sesyen di bawah s 96(1) APJ.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan keputusan-keputusan mahkamah-mahkamah dibawah dan membenarkan perayu untuk menguatkuasakan keputusan mahkamah sesyen terhadap responden:

(1) Menurut dikta Mahkamah Persekutuan dalam kes *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825 dan *Pacific & Orient Insurance Co Berhad v Yeap Tick In* (Rayuan No 6 dalam *AmGeneral*) dibaca bersama kes *Malaysian Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440, mangsa pihak ketiga dalam kemalangan jalan raya tidak dikehendaki memfailkan prosiding pemulihan berasingan terhadap syarikat insurans pemilik kenderaan untuk mendapatkan semula jumlah penghakiman yang diperintahkan dalam tindakan tort antara pihak ketiga dan pihak yang diinsuranskan (lihat perenggan 42).

(2) Sekiranya penanggung insurans ingin mencabar liabilitinya untuk membayar dengan alasan bahawa pihak yang menuntut tidak termasuk dalam kelas orang yang disenaraikan dalam s 91(1) (b) APJ atau bahawa polisi itu tidak sah atau tidak boleh dikuatkuasakan, penanggung

insurans perlu mendapatkan pengisytiharan yang mengikat pihak ketiga menurut s 96(3) APJ sebelum penghakiman liabiliti diberikan. Sebagai alternatif, penanggung insurans harus berusaha untuk campur tangan dalam saman liabiliti tort dan mempertikaikan isu liabiliti polisi ketika perbicaraan tindakan tersebut. Tanpa relif tersebut, liabiliti penanggung insurans untuk membayar adalah serta-merta kerana s 96(1) APJ mewajibkan penanggung insurans untuk membuat pembayaran selepas penghakiman diperolehi terhadap pihak yang diinsuranskan oleh pihak ketiga yang menuntut (lihat perenggan 43).

(3) Bahagian IV APJ adalah undang-undang sosial untuk orang yang berkepentingan untuk tujuan insurans pihak ketiga. Oleh itu, sebarang tuntutan sah pihak ketiga untuk kematian atau kecederaan yang dialami akibat kemalangan jalan raya yang melibatkan kenderaan yang diinsuranskan haruslah diselesaikan dengan segera dan tanpa melalui proses litigasi atau kos guaman yang berlebihan. Oleh itu, keperluan untuk menentukan tuntutan tort serta penafian liabiliti penanggung insurans, sekiranya ada, diselesaikan tanpa kelewatan yang tidak wajar atau penambahan kos berlebihan untuk tindakan pemulihan yang mana ianya akan memanjangkan penyelesaian muktamad tuntutan pihak ketiga untuk pampasan (lihat perenggan 44).

(4) Kes-kes kemalangan merupakan sebahagian besar beban kes sivil mahkamah rendah dan penambahan satu lagi peringkat proses penghakiman yang tidak perlu dalam bentuk tindakan pemulihan adalah sama sekali tidak wajar. Sumber mahkamah yang terhad boleh digunakan dengan lebih baik sekiranya prosiding sedemikian dihapuskan dan proses undang-undang dilakukan secara adil dan cekap kepada semua pihak, sama ada mangsa pihak ketiga, pelaku tort yang diinsuranskan atau penanggung insurans untuk memastikan keadilan dapat dilaksanakan (lihat perenggan 44).

(5) Seksyen 91(1)(b)(bb) APJ tidak beroperasi untuk mengecualikan liabiliti berkanun responden di bawah s 96(1) APJ untuk menanggung kerugian TSK dan membayar perayu jumlah dalam penghakiman mahkamah sesyen. Perkataan 'selain daripada penumpang yang dibawa atas sebab atau menurut kontrak pekerjaan' yang terdapat dalam perenggan (d) Pengecualian kepada Seksyen B dalam polisi yang juga menepati peruntukan s 91(1)(b)(bb) APJ, bukan sahaja merujuk kepada orang yang diambil bekerja oleh orang yang diinsuranskan atau pemandu sah yang diinsuranskan tetapi juga kepada mana-mana orang menurut kontrak pekerjaan dengan majikan pihak ketiga yang lain. Keterangan di mahkamah sesyen dalam saman liabiliti menunjukkan dengan jelas bahawa perayu tidak bermain-main semasa menaiki kenderaan yang diinsuranskan dan dia juga tidak membawa ahli keluarga. Sebaliknya, dia adalah penumpang kenderaan tersebut menurut kontrak pekerjaan

dengan syarikat akuakultur pada waktu kemalangan. Oleh itu, perayu tidak sepatutnya dilayan secara berbeza daripada mana-mana mangsa 'pihak ketiga' lain yang telah memperoleh penghakiman terhadap pihak yang diinsuranskan mengenai kecederaan yang dialaminya ketika kemalangan jalan raya kenderaan bermotor (lihat perenggan 67–68 & 70).

(6) Seksyen 91(1)(b) dan peruntukan (bb) APJ melindungi mangsa kemalangan pihak ketiga yang menaiki kenderaan bermotor yang diinsuranskan menurut kontrak pekerjaan. Mana-mana penumpang sedemikian dimaksudkan oleh Parlimen untuk menjadi 'pihak ketiga' yang dilindungi oleh APJ. Oleh kerana perayu telah membuktikan bahawa dia melakukan perjalanan dengan kenderaan yang diinsuranskan menurut kontrak pekerjaan, responden sebagai penanggung insurans terikat dengan s 96(1) dan 91(3) APJ untuk mematuhi penghakiman yang telah diperolehi oleh perayu terhadap orang yang diinsuranskan (lihat perenggan 65).

Cases referred to

AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals [2022] 5 MLJ 825; [2022] 8 CLJ 175, FC (folld)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Berjaya Sompo Insurance Bhd v Chen Boon Kwee & Anor [2021] MLJU 2140; [2021] CLJU 1862; [2021] 1 LNS 1862, HC (not folld)

Chen Boon Kwee v Berjaya Sompo Insurance Berhad [2023] MLJU 3416; [2024] 8 CLJ 677, CA (not folld)

Izzard v Universal Insurance Co Ltd [1937] AC 773, HL (refd)

Jenkins v Deane (1933) 103 LJKB 205, KBD (refd)

Jiwaneswary a/p Raman v Etiqa General Takaful Bhd [2023] 2 MLJ 437; [2023] CLJU 93; [2023] 1 LNS 93, CA (folld)

Johannes Koplan v Aw Chen [1970] 1 MLJ 220; [1970] CLJU 42; [1970] 1 LNS 42 (refd)

Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 6 MLJ 788; [2011] 5 CLJ 866, CA (overd)

Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo [2020] 1 MLJ 440; [2019] 10 CLJ 731, FC (refd)

Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh [2009] 1 MLJ 21; [2008] 6 CLJ 209, FC (refd)

MSIG Insurance (M) Bhd v Md Aznol Hafiz bin Amir & Ors [2020] 8 MLJ 659; [2019] 4 CLJ 384, HC (refd)

Pacific & Orient Insurance Co Bhd v Kamacheh a/p Karuppen [2015] 4 MLJ 218; [2015] 4 CLJ 54, CA (refd)

Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU

2217; [2011] 1 CLJ 947, CA (folld)
Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231, HL (refd)
Tang Loon Pau & Ors v Mohd Salihin bin Kotni & Anor [2024] 2 MLJ 256; [2023] 8 CLJ 105, CA (folld)
The People's Insurance Co (M) Bhd v Ting Tiew Kiong [2017] 5 MLJ 624; [2007] 5 CLJ 225, CA (refd)
Tirumeniyar a/l Singara Veloo v Malaysian Motor Insurance Pool [2017] 6 MLJ 776; [2017] 8 CLJ 682, CA (refd)
Union Insurance (M) Sdn Bhd v Chan You Young [1999] 1 MLJ 593; [1999] 2 CLJ 517, CA (refd)
United India Insurance Co Ltd v Santro Devi and Others [2009] 3 MLJ 130, SC (refd)
Yeap Tick In v Pacific & Orient Insurance Co Bhd [2020] 3 MLJ 449; [2020] 4 CLJ 500, CA (overd)

Legislation referred to

Federal Constitution art 8(1), (2)
Road Transport Act 1934 [UK]
Road Transport Act 1987 ss 91, 91(1), (1)(b), (1)(b)(aa), (1)(b)(bb), (4), 92(2), 96, 96(1), (2), (3), Part IV

Appeal from: *Chen Boon Kwee v Berjaya Sompo Insurance Berhad* [2023] MLJU 3416 (Court of Appeal, Putrajaya)

GK Ganesan (with R Ganavathy Naidu a/l Rasu, KN Geetha, Aloysius Ng Inn Ee, Chong Zhenghao, TP Vaani, JN Lheela and B Thinagaran) (Murphy & Dunbar) for the appellant.
Malik Imtiaz Salwar (with JS Naicker, Yvonne Lim and Kishan Govinda Raju) (Naicker & Assoc) for the respondent.

Vazeer Alam FCJ:

INTRODUCTION

[1] This appeal centres on following main issues, namely:

(a) whether in the circumstances of this case, s 91(1)(b)(bb) of the Road Transport Act 1987 ('the RTA') operated to exclude the respondent's statutory liability under s 96(1) of the RTA, such that it did not have to pay the appellant the benefit of a judgment he had obtained against the policy-holder at the sessions court;

(b) whether s 96(1) of the RTA permits the beneficiary of a judgment against an insured person to directly enforce the same against an insurer, in this case the respondent, without the need for a further judgment directly against the insurer/respondent by way of a recovery action; and

(c) whether s 96(3) of the RTA provides the sole recourse to an insurer who intends to challenge its liability under s 96(1) of the RTA; and if answered in the affirmative; whether an insurer who has failed to obtain a declaration that an insurance policy was void and/or unenforceable under s 96(3) of the RTA before liability was incurred, is barred from seeking any other relief to challenge or delay the insurer's liability under s 96(1) of the RTA.

BACKGROUND FACTS

[2] The respondent, Berjaya Sompo Insurance Bhd, had issued a third-party risk motor insurance policy ('policy') in relation to the use of a Toyota Camry motor vehicle bearing registration number WYC 8461 ('vehicle'). The owner of the vehicle and insured policy holder was Tan Saw Kheng ('TSK'), the second defendant in the sessions court suit, and wife of the appellant in this appeal and plaintiff in the sessions court suit.

[3] On 16 June 2015, TSK authorised one Masri bin Tamin ('Masri'), who was the appellant's work colleague, to drive the vehicle to Desaru with the appellant as passenger on work related travel. The appellant was working at Asia Aquaculture (M) Sdn Bhd, and on that fateful day he was directed to travel to the employer's hatchery in Desaru to conduct an audit. Whilst on the road to Desaru, the vehicle was involved in a collision with a motor lorry and the appellant was injured. The appellant instituted proceeding in the Batu Pahat Sessions Court against the lorry owner, lorry driver, Masri and TSK claiming damages for negligence.

[4] After full trial, the sessions court decided that Masri, as driver of the vehicle, was 100% liable, and TSK as owner of the vehicle was vicariously liable on grounds that Masri was her authorised agent. Judgment was thus entered for the appellant against both Masri and TSK on 25 November 2019 ('sessions court judgment'). Masri and TSK appealed against this judgment. However, the appeal was dismissed by the High Court on 12 April 2021 and the Court of Appeal on 25 January 2022. Hence, the issue of liability of Masri and TSK for the injury sustained by the appellant in the accident had been determined with finality and damages quantified and awarded. In the circumstance, the respondent as insurer would ordinarily have had to satisfy the sessions court judgment by virtue of their statutory liability under s 96(1) of the RTA.

ORIGINATING SUMMONS AT THE HIGH COURT

[5] However, on 9 February 2021, the respondent, as plaintiff, in order to ultimately deny liability under s 96(1) of the RTA filed an originating summons in the High Court against the appellant, as first defendant, and the

insured TSK, as the second defendant, for the following orders:

(a) that the respondent, as insurer, was not liable to indemnify TSK as regards the sessions court judgment until the appellant had filed and obtained a judgment against the respondent vide a recovery action; and

(b) the sessions court judgment obtained by the appellant against TSK, the insured, be stayed.

[6] At the High Court, the respondent submitted that the appellant must file a recovery action if he is desirous of recovering the sessions court judgment from the respondent based on the following grounds:

(a) TSK as the owner of the vehicle did not purchase additional coverage so as to be indemnified for any legal liability to passengers — an argument based on the provisions of s 91(1)(b)(bb) of the RTA;

(b) the appellant is not a 'third party' as envisioned under s 96 of the RTA; and

(c) any claim, other than by a third party, is subject to the compliance of all terms and conditions set out in the policy of insurance.

[7] The respondent, it is to be noted, did not however contend that the insurance policy was invalid or unenforceable; but merely that the terms and conditions of the insurance policy did not cover liability for a claim arising from injury to a passenger travelling in the vehicle, in other words that the policy did not cover passenger risk.

[8] The respondent submitted that ordinarily in a motor vehicle negligence claim, once a plaintiff has obtained a judgment against the defendant, the victim/plaintiff as a 'third party' under s 91(1) of the RTA can proceed to enforce the judgment against the insurer directly pursuant to s 96(1) of the RTA. However, the respondent argued that if it involves a reliance by the insurer on any exception to liability clause in the insurance policy, such as in this case where the insurance policy states that the insurer would not be liable for the death of or bodily injury to any person carried in the motor vehicle 'other than a passenger carried by reason of or in pursuance of a contract of employment', then there should be two separate actions, ie firstly, an action to determine the tortfeasor/insured's liability and quantum of damages; and secondly, a recovery action to enforce the judgment against the insurer where the issues before the court would be the construction or interpretation of the terms of the insurance policy and the application of ss 91 and 96 of the RTA.

[9] The High Court agreed with the respondent and decided that a fresh recovery action would have to be instituted against respondent if the appellant wished to enforce the sessions court judgment, as the respondent had raised the

issue of statutory liability being excluded under s 91(1)(b)(bb) of the RTA. Hence, the High Court held that:

> [29] Consequently, the plaintiff is not liable to indemnify the second defendant until the first defendant has filed and obtained a judgment against the plaintiff through a recovery action.

See *Berjaya Sompo Insurance Bhd v Chen Boon Kwee & Anor* [2021] MLJU 2140; [2021] CLJU 1862; [2021] 1 LNS 1862 for the full judgment of the High Court.

[10] Hence, the High Court ruled in favour of the respondent and held that a recovery action must be filed by the appellant before the sessions court judgment be statutorily satisfied by the respondent pursuant to s 96(1) of the RTA. The High Court stayed all execution of the sessions court judgment pending the appellant filing the recovery action.

[11] Aggrieved by the decision of the High Court, the appellant appealed to the Court of Appeal.

AT THE COURT OF APPEAL

[12] In brief, the main issue before the Court of Appeal was whether recovery proceeding against the insurer was mandatory prior to enforcing a judgment obtained against the insured tortfeasor in a road accident negligence claim by the injured third party.

[13] The Court of Appeal unanimously dismissed the appeal and affirmed the High Court's decision. The Court of Appeal's grounds of judgment states as follows (among others):

> Whether there is a need for the first defendant to initiate recovery action against the plaintiff after obtaining judgment at BPSC
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> [23] The core issue in this case is whether a party who had obtained a judgment for a tortious claim in view of the road accident, must proceed to file and succeed in a recovery action against the insurer before the insurer could be made liable to indemnify the winning party for the first action for tortious claim.
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> [24] In this regard, all three cases, *Union Insurance, Letchumanan Gopal* and *Yeap Tick In,* referred by the learned JC and highlighted earlier, are indeed indicative that the recovery action needs to be filed against the insurer subsequent to the judgment for tortious claim being obtained.
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> [25] In *Union Insurance,* there were indeed two separate suits. First, for the claim arising from the road accident and second, where the insurance company was sued to determine whether it should pay damages after the judgment was obtained for the first suit. The Court of Appeal decided that the second suit was proper and it

held as follows:

> The respondent was entitled to recover from the insurance company as she was travelling in the car belonging to her husband, who was the insured, and driven by her son, who was the authorised driver, under the relevant policy by reason of or in pursuance of a contract of employment not with the insured.

[26] This case supported the decision of the learned JC that the recovery action ought to be filed before the plaintiff could be liable to indemnify the first defendant in respect of the first action where judgment was already obtained by the first defendant.

[27] We are also of the considered view that the second case of the Court of Appeal, *Letchumanan Gopal,* relied on by the learned JC in coming to the decision of the HC, is also supportive of the HC's finding that a recovery action needs to be filed before the plaintiff could be liable. Abdull Hamid Embong (JCA), in delivering judgment held as follows:

> [20] It is our view that the liability and recovery actions are distinct from each other. The former is a claim founded on tort whereas the latter is based on a statutory right provided under the provisions of the RTA. For this reason alone it would be unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue at the recovery action stage.
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> [21] In the liability action, the issue before the court would be to determine negligence whereas in the recovery action the issues include the construction of the terms in the insurance policy and the application of s 91 and s 96 of the RTA. It is upon this construction of the insurance policy that the insurers raised for the first time in the recovery action. In this appeal, P&O, as the insurers is thus seeking to declare that the policy as against the deceased, is unenforceable due to the exception in its terms. This issue remains alive and was brought up on appeal to the High Court and now before us.

[28] It was also correct for the learned JC to note the supporting judgment of Abdul Malik Ishak (JCA) in the above case where it is said:

> [32] Now, since the appellant was a mere passenger in the motor lorry No WT 1835 and not working for Kumpulan Jagoh Angkut Sdn Bhd, the High Court was right in holding that P&O cannot be held liable in the recovery action filed by the appellant. There was no contract of service between the appellant and Kumpulan Jagoh Angkut Sdn Bhd.

[29] The relevant passages quoted in the case above, illustrate the point that it would not be sufficient for the first defendant to merely obtain judgment from the BPSC in respect of liability. There is still a need to initiate a recovery action against the plaintiff as the insurer.

[30] In respect of the Court of Appeal case of *Yeap Tick In,* the learned JC accepted that the case had ruled that there is no necessity to file a further action for recovery once the judgment on liability is obtained. Nonetheless, the learned JC rightly quoted the judgment of Harmindar Singh JCA (now FCJ) in that case, which states

as follows:

> [25] Similarly in the case of *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788; [2011] 5 CLJ 866 which case was heavily relied upon by the respondent. The insurer there was not contending that the policy was invalid or unenforceable. The insurer relied on an exception of the liability clause in its insurance policy that stated that the insurer would not be liable for the death of or bodily injury to any person 'other than a passenger carried by reason of or in pursuance of a contract of employment'. In such a case, the insurer can resist the recovery suit by stating in its defence that the terms of the policy did not cover the passenger.
>
> [31] Thus, we are of the view that the learned JC was not in error to refer to the above passage. This is when the insurer relied on the clause in the insurance policy that it is not liable other than to the person who is rightly carried by reason of a contract of employment. The passage clearly states in that event the insurer can resist the recovery suit by stating that the policy did not cover the claimant/passenger. That passage indicates the need for a recovery suit and not just the liability suit.
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> [32] In the present case too before us, the learned JC correctly found that the plaintiff did not contend that the insurance policy was invalid or unenforceable. What the plaintiff contended was that the first defendant is not covered by the policy as the second defendant failed to purchase additional coverage for passengers like the first defendant.
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> [33] Thus, it is clear to us that the learned JC had correctly referred to all the case law authorities above to find there is a need for the first defendant to file the recovery action before the plaintiff could be held liable.

THE FEDERAL COURT — QUESTIONS OF LAW

[14] Dissatisfied with the decision of the Court of Appeal, the appellants sought leave to appeal and obtained the same in respect of the following questions of law:

(a) question 1 — whether the protection afforded to a third party under s 96(1) of the RTA ie 'any person' defined in s 91(1)(b) covers the exception (bb) the proviso in s 91(1)(b) ie any passenger who is in the vehicle by reason of a contract of employment?

(b) question 2 — whether to recover the judgment sum in the tortious action, the victim is then required to file separate recovery proceedings against the insurer of the vehicle-owner, by reference to the dicta of the Federal Court in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175 and *Pacific & Orient Insurance Co Berhad v Yeap Tick In* (Appeal No 6 in *AmGeneral*); read with *Malaysian Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440?

(c) question 3 — whether s 96(3) of the RTA provides the sole recourse to an insurer who intends to challenge its liability under s 96(1) of the RTA; and if answered in the affirmative:

(i) whether an insurer who has failed to obtain a declaration that an insurance policy was void or unenforceable under s 96(3) of the RTA before liability was incurred, is barred from seeking any other relief to challenge or delay the insurer's liability under s 96(1) of the RTA?

(ii) whether the findings of the court that the victim is travelling by reason of or in pursuance of a contract of employment renders the issue of whether the victim is a third party under the RTA res judicata? and

(iii) whether the demand of the insurer that the victim has to file recovery proceedings over and above s 96(3) of the RTA is in breach of the victim's constitutional rights under art 8(1) and 8(2) of the Federal Constitution and discriminates the victim?

OUR DECISION

[15] We shall first deal with questions 2 and 3 as they are very much related. In answering question 2, the answer to question 3 would be apparent.

First issue: Is there a necessity for a recovery action?

[16] An insurer, by virtue of s 96(1) of the RTA, is required to satisfy any judgment obtained against an insured person covered by a policy of insurance issued to the insured by the insurer in respect of any liability incurred by the insured that results in death or bodily injury to a third party caused by or arising out of the use a motor vehicle covered under the insurance policy. Section 96(1) of the RTA reads:

> If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[17] However, before the insurer's statutory obligation to pay under s 96(1) of the RTA arises, several conditions must be satisfied, and they are:

A (a) a judgment must have been obtained by the third party against the insured person, usually based on a claim of damages for negligence;

(b) a notice of commencement of the proceedings in respect of the action where the judgment was obtained must have been given by the third party to the insurer before or within seven days after the commencement of the said action against the insured person pursuant to s 96(2) of the RTA; and

(c) the policy of insurance issued by the insurer must be in force at the time of the event that caused the bodily injury or death giving rise to the liability of the insured tortfeasor, in that:

(i) the certificate of insurance must have been delivered by the insurer to the insured as stipulated in s 91(4) of the RTA; and

(ii) the insurance policy was not invalidated:
(1) by cancellation; or
(2) by virtue of any terms contained in the insurance policy as provided in s 96(2) of the RTA; or
(3) by a court declaration pursuant to s 96(3) of the RTA.

[18] Sections 96(2) and (3) of the RTA reads:

(2) No sum shall be payable by an insurer under subsection (1) —

(a) in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings;

(b) in respect of any judgement, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either —

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[19] In the present case, at the Batu Pahat Sessions Court the appellant filed an action for negligence against four defendants, namely, TSK as the vehicle owner, Masri as TSK's authorised driver, the owner of the lorry and the driver of the lorry involved in the collision ('the liability action'). The appellant's solicitors, Messrs Murphy & Dunbar, served the s 96(2) of the RTA statutory notice dated 10 October 2017 on the respondent within the stipulated time, and there is no dispute as to this fact. The respondent then appointed solicitors, Messrs C Y Ong & Co, to represent TSK, the insured, pursuant to condition 2(f) of the policy. This is customary industry practice as was noted by the Federal Court in *Johannes Koplan v Aw Chen* [1970] 1 MLJ 220; [1970] CLJU 42; [1970] 1 LNS 42:

Compulsory insurance against third party risks has made alterations in the common law whereby insurers are made directly liable to satisfy judgments against the insured. The negligent driver is only the nominal defendant, whereas the party injuriously affected by an award of damages is the insurer by and in whose interest should be defended.

Similar observation was made by the Court of Appeal in *Tang Loon Pau & Ors v Mohd Salihin bin Kotni & Anor* [2024] 2 MLJ 256; [2023] 8 CLJ 105 (CA).

[20] Hence, once notice under s 92(2) of the RTA is given and the cause papers are served on the insurer, solicitors would ordinarily be appointed to have conduct of the defence on behalf of the insured. And that was the case in the present appeal where the respondent appointed the firm of Messrs CY Ong & Co to act for the insured/defendant in the liability action at the sessions court. In fact, Messrs CY Ong acted for the insured/defendant not only at the sessions court, but also the High Court and Court of Appeal in respect of appeals emanating from the liability action. In such circumstance, although the insurers were defending their insured, they were in actual fact protecting their own pockets. Thus, the insurer as the *de facto* defendant, pursuant to the statutory liability that may arise under s 96(1) of the RTA to satisfy the tortious liability judgment, would in effect be involved in the liability action either in the name of the insured/defendant, or in their own name as

intervener/co-defendant, as in the case of *Jiwaneswary a/p Raman v Etiqa General Takaful Bhd* [2023] 2 MLJ 437; [2023] CLJU 93; [2023] 1 LNS 93 (CA).

[21] Hence, the purpose for the mandatory requirement of the notice pursuant to s 96(2) of the RTA as a condition precedent for liability to arise under s 96(1) of the RTA is very clear. The statutory notice serves to inform the insurer of the impending action against the insured, and of their potential statutory liability that may arise pursuant to s 96(1) of the RTA. This would afford the insurer the opportunity to appoint solicitors of choice to appear for the defendant in the liability suit and protect the insurer's interest as the ultimate paymaster. Hence, without such notice the liability to pay the third party pursuant to s 96(1) of the RTA does not arise.

[22] After having received the notice and the cause papers of the liability suit, the insurer can take any of the following action:

(a) negotiate and settle the claim with the third party claimant; or

(b) appoint solicitors for the insured/defendant and defend the liability action in the name of the defendant, in which case the tortious liability of the insured could be challenged; and/or

(c) rely on the statutory remedy under s 96(3) of the RTA and seek a declaration from the court to avoid liability on grounds that the policy of insurance was void or unenforceable; and/or

(d) apply to intervene in the liability suit to challenge their liability under the terms of the policy of insurance and preserve their legal and commercial interest in order to deny liability under s 96(1) of the RTA on any one or more of the legally recognised grounds such as fraud or collusion between the insured and the third party, or that there was an exception to liability clause in the policy of insurance that absolved the insurer's liability, or that the tortious liability of the insured was not covered under the terms of the policy of insurance.

[23] In the present case, the respondent appointed solicitors to act for the insured. However, whilst proceedings were on going in the sessions court, the respondent's solicitors (the same firm of solicitors who were acting for the insured/defendant in the liability action at the sessions court) issued a disclaimer to the insured, putting her on notice that the policy of insurance did not cover liability to passengers who were members of her household pursuant to the Exception to Section B of the policy of insurance. The respondent contended that the appellant herein, who was the plaintiff in the sessions court,

and who was the insured's husband, was a mere passenger in the vehicle whose injury was not covered under the policy as no additional cover was taken to cover such contingencies.

[24] Thus, the respondent was not taking the stand that the insurance policy was invalid or unenforceable but rather that there was no liability on the part of the respondent on account of a clause on exception to liability in the insurance policy. Thus, the respondent argued that the appellant was not a 'third party' for the purposes of the statutory liability to arise under s 96(1) of the RTA. Hence, the respondent submitted that the appellant should file a recovery action against the respondent in which the issues of the construction or interpretation of the terms in the insurance policy and the application of ss 91 and 96 of the RTA could be ventilated and decided.

[25] The learned judicial commissioner of the High Court agreed with the respondent and said this in the grounds of judgment:

> [25] Based on the abovementioned authorities, it is clear that in a road accident claim once a plaintiff has obtained a judgment against the defendant, he then can proceed to enforce the judgment.
>
> [26] However, if it involves the exception to the liability clause in the insurance policy which states the insurance would not be liable for the death of or bodily injury to any person 'other than a passenger carried by reason of or in pursuance of a contract of employment', then there should be two separate actions.
>
> [27] In the first action, the issue before the court is to determine the negligence including liability and quantum of damages. Whereas, in the second action (the recovery action) the issues before the court are the construction or interpretation of the terms in the insurance policy and the application of ss 91 and 96 of the RTA.
>
> [28] Thus, I agree with the plaintiff that a recovery action must be made by the first defendant before judgment obtained by the first defendant at the Batu Pahat Sessions Court would be satisfied by the plaintiff.

[26] This decision of the High Court and the underlying reasoning was affirmed by the Court of Appeal. The Court of Appeal, in coming to its decision to affirm the High Court's decision, had referred to several case authorities, including *Union Insurance (M) Sdn Bhd v Chan You Young* [1999] 1 MLJ 593; [1999] 3 CLJ 517; *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788; [2011] 5 CLJ 866; *Yeap Tick In v Pacific & Orient Insurance Co Bhd* [2020] 3 MLJ 449; [2020] 4 CLJ 500 which in some respects supported the proposition that a recovery action needed to be filed against the insurer subsequent to the third party obtaining judgment against an insured tortfeasor. Ultimately, the Court of Appeal affirmed the decision of the High Court, stating that denying the need for a recovery action would unfairly prohibit the respondent from raising possible defence and frustrate the legal

process. See *Chen Boon Kwee v Berjaya Sompo Insurance Berhad* [2023] MLJU 3416; [2024] 8 CLJ 677 for the full judgment of the Court of Appeal.

[27] We, however, respectfully disagree with the High Court and the Court of Appeal. There were, at one point, conflicting authorities at the Court of Appeal level on the issue of whether there was a requirement in law for a separate recovery action to enforce a judgment pursuant to the provisions of s 96(1) of the RTA. This question was put to rest by the Federal Court in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175, where this court held that a recovery action is not necessary for the insurer to satisfy any judgment on tortious liability obtained against the insured.

[28] Both the High Court and Court of Appeal had relied heavily on the Court of Appeal's decision in *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy; deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788 for the proposition that there needs to be a recovery action.

[29] However, the Federal Court had effectively overruled *Letchumanan a/l Gopal* in *Pacific & Orient Insurance Co Berhad v Mohamad Rafiq Muiz bin Ahmad Hanipah* (Appeal No 2 in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors*) where in reference to *Letchumanan a/l Gopal* the court stated as follows:

> [89] It will be noted that the insurer in *Letchumanan a/l Gopal* relied on an exception to a liability clause in its insurance policy which stipulated that the insurer would not be liable for the death of or bodily injury to any person 'other than a passenger carried by reason of or in pursuance of a contract of employment'. This, with respect, appears to be an attempt to contract out of statute, which is prohibited by s 94 of the RTA. Further, there was no mention, let alone a discussion on s 96(3) of the RTA.
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> ...
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> [102] The first appellant had another argument. It was contended that the respondent as the third party claimant could not apply to set aside the order pursuant to O 35 r 1(2) of the Rules of Court 2012 because he had a specific remedy provided by s 96(1) of the RTA to file for recovery against the insurer. The argument must fail. *There is nothing in s 96(1) to say that the third party claimant must first obtain another judgement against the insurer before he could proceed to enforce the judgement that he had earlier obtained against the insured. After all, the judgement debt of the insured becomes the judgement debt of the insurer* ....
>
> [103] *Therefore, the question of the respondent having to file for recovery proceedings under s 96(1) against the first appellant as contended by learned counsel does not arise at all: see also the decisions of the Court of Appeal in Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 *and Yeap Tick In which decisions on this point we are in agreement with*. In *Muniammah Muniandy,* this is what Ramly Ali JCA (as he then was) said:

[21] *Nowhere does s 96(1) of the Road Transport Act 1987 say that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured*. Therefore, the question of the respondent having to file a recovery proceedings under s 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. *In short, the respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceedings against the insurer*. (Emphasis added.)

[30] *Yeap Tick In* was one of the cases in the appeals before the Federal Court in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175. The Federal Court maintained that there was no requirement to file a separate action for a judgment to enforce the judgment against the insurer. The relevant passage in the judgment is set out as follows:

[218] *We have in Appeal No 2 decided that there is no necessity for a third party claimant (in this case the respondent) who had obtained judgment from the trial court against the insured to obtain another judgment against the insurer (in this case the appellant) before the third party claimant could enforce the trial court's judgment (in this case the Shah Alam sessions court judgment) against the insured*. Therefore the question of the appellant's entitlement to an injunction, *quia timet* or permanent against the respondent does not arise. The two leave questions must therefore be answered in the negative.

[31] In *Yeap Tick In v Pacific & Orient Insurance Co Bhd* [2020] 3 MLJ 449; [2020] 4 CLJ 500 (CA) ('*Yeap Tick In* (CA)'), notwithstanding having concluded that recovery proceedings are not necessary for a judgment to be enforced under s 96(1) of the RTA, the Court of Appeal went on to state there may circumstances in which recovery proceedings would be necessary ie where the insurer is not seeking to declare the insurance void and unenforceable under s 96(3) of the RTA. In this regard, the Court of Appeal said at paras [23]–[25] of the judgment:

[23] The net effect is that once a plaintiff obtains a judgment against an insured, the insurer cannot take the position that since the insurer is not a party to that judgment, it need not pay the judgment sum as stated. On the contrary, the *third party who had obtained the judgment can enforce the judgment against the insurer without having to first file a recovery proceeding against the said insurer*.

[24] *The only instance, in our view, where recovery proceedings are necessary is when the insurer is not seeking or unable to declare the insurance void and unenforceable*. For example, where a fake policy had been issued in the name of the insurer, it would be pointless to declare such a policy void and unenforceable as no such policy ever existed. In this context, it can hardly be doubted that s 96(3) of the RTA 1987 presupposes the existence of a valid policy of insurance as set out in s 96(1) of the same (see *Tokio Marine Insurans (M) Bhd (which obtained all rights and liabilities of*

Amanah General Insurance Bhd vide vesting order dated 22 October 2002, wherein Amanah General Insurance Bhd was formerly known as Trust International Insurance (M) Bhd prior to a change of name vide Form 13 dated 29 December 1997) v Mohd Radzi bin Zainuddin & Anor [2012] 8 MLJ 814; [2012] 10 CLJ 840).

[25] Similarly in the case of *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788; [2011] 5 CLJ 866 which case was heavily relied upon by the respondent. The insurer there was not contending that the policy was invalid or unenforceable. The insurer relied on an exception of the liability clause in its insurance policy that stated that the insurer would not be liable for the death of or bodily injury to any person 'other than a passenger carried by reason of or in pursuance of a contract of employment'. In such a case, the insurer can resist the recovery suit by stating in its defence that the terms of the policy did not cover the passenger.

[32] It is very clear that this court in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175 had preferred the ratio in *Muniammah Muniandy* over that of *Letchumanan a/l Gopal,* and therefore to that extent *Letchumanan a/l Gopal* is overruled and no longer good law in respect of the requirement of a recovery action. Similarly, this court in the *Yeap Tick In* appeal had disagreed with the Court of Appeal and ruled that a recovery action is unnecessary. To that extent, the Court of Appeal's observation in *Yeap Tick In* (CA), in particular paras 24–25 of the Court of Appeal judgment referred to above, would by implication be overruled. We would further respectfully state that even in circumstances identified by the Court of Appeal in *Yeap Tick In* (CA), eg where the insurance policy is a fake, or where the insurer cannot avail itself of the relief afforded in s 96(3) of the RTA, there is still no necessity for a recovery action. After all if it was a fake policy of insurance, the precursor to liability under s 96(1) of the RTA, ie that an insurance policy must have been issued and delivered to the insured by the insurer would not have been met. Hence, the factual circumstances identified in *Yeap Tick In* (CA) that may result in the insurer avoiding liability under s 96(1) of the RTA could be raised by the insurer through intervening in the liability suit, as was observed by the Court of Appeal in *Jiwaneswary a/p Raman v Etiqa General Takaful Bhd* [2023] 2 MLJ 437; [2023] CLJU 93; [2023] 1 LNS 93 (CA), and *Tang Loon Pau & Ors v Mohd Salihin bin Kotni & Anor* [2024] 2 MLJ 256; [2023] 8 CLJ 105 (CA). We agree with the observations made by the Court of Appeal in these two cases in respect of the rights of the insurer to intervene in the liability suit in order to protect its interest.

[33] In *Tang Loon Pau,* the Court of Appeal observed:

[39] The insurer's right to intervene and protect their legal and commercial interest was recently discussed by the Court of Appeal in the case of *Jiwaneswary a/p Raman v Etiqa General Takaful Bhd* [2023] 2 MLJ 437; [2023] CLJU 93; [2023] 1 LNS 93 (CA). *The Court of Appeal emphasised that an insurer does not have to take the s 96(3)*

of the RTA route and that they could intervene in the running down action especially where they intend to show that the insured motor-vehicle was not involved in the accident and that there was collusion between the insured and the third party claimant.

[40] In that case, *the Court of Appeal stated that 'despite the availability of the statutory remedy under s 96(3) of the RTA to avoid liability, the (insurer) still had the right to intervene in the magistrate's court proceedings*. The (insurer) had based its intervener application, inter alia, on the ground that the insured vehicle was not involved in any collision with the appellant's vehicle. In other words, the (insurer) was alleging collusion between the appellant and the alleged tortfeasor to defraud the (insurer). The (insurer) intended, after intervention, to cross-examine the witnesses and call their own witnesses to put forth its case of collusion so that all available evidence was before the magistrate when the final decision was made on liability.

And in *Jiwaneswary Raman* the Court of Appeal had further observed:

[47] ... even if the respondent were to file an application for declaration under s 93(3) of the RTA, after the order for intervention is made, an application can be made for both the tortious claim and the s 96(3) of the RTA application be transferred to the sessions court for the purposes of both the matters being heard and disposed of by the same court. This would be consonant with the ruling of this court in *Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu* [2021] 1 MLJ 303; [2021] 1 CLJ 523, and would be in tandem with the pronouncement of the Federal Court in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175 to the effect that ideally the determination of tortious liability between the parties in the tort claim and the application for declaration under s 96(3) of the RTA by the insurer to avoid liability ought to be heard and determined by the same court.

[34] This approach would be in consonant with the legislative purpose of enacting the provisions contained in Part IV of the RTA, particularly ss 91 and 96, which are taken substantially from the Road Traffic Act 1934 of England.

[35] In a very early commentary on the English Road Traffic Act 1934, *Shawcross on The Law of Motor Insurance* by Christopher Shawcross & Michael Lee (2nd Ed) (1949), Butterworth & Co (Publishers) Ltd at p 271, it is stated that the Road Traffic Act 1934 was enacted to address the shortcomings and inadequacies of their earlier Act in 1930. These shortcomings included insurance policies bristling with conditions, the technical breach of which rendered the policies invalid, ineffective and useless to effect the object of the legislation, namely the satisfaction of third party claims for death or bodily injury arising out of using a motor vehicle on the road. The judgment of Goddard J (as he then was) in *Jenkins v Deane* (1933) 103 LJKB 205 may be referred to for a summary of some of the many loopholes which the Act of 1930 contained, which the insurance companies were exploiting. The learned authors of *Shawcross on The Law of Motor Insurance* further state:

The Act of 1934 was designed for the purpose of stopping these holes. This it was

intended to effect by two methods. *In the first place it compelled insurers to discharge any liability incurred by their assured in respect of fatal or bodily injury covered by the policy as soon as judgment in respect of it is obtained against him by a third party*. In the second place it rendered ineffective in regard to such liabilities certain clauses in a motor policy which allowed insurers to issue policies purporting to cover the liability required to be covered by the 1930 Act, whist in fact not covering that liability if the insured vehicle was being used in any manner proscribed by the policy or if the assured had committed any technical breach of its formal terms.

[36] Hence, the legislative purpose of the English Road Transport Act 1934 was to ensure that insurers promptly satisfied any judgment obtained by the third party against the insured. Thus, the reiteration by this court in *AmGeneral Insurance Bhd v Sa' Amran Atan & Ors* where it was further emphasised that an insurer is bound to settle the judgment sum against the insured without the need to have a recovery action by the claimant.

[37] The RTA, particularly Part IV thereof, to some extent is a piece of beneficent social legislation. In *Sa' Amran*, this court recognised this and quoted a passage from the Indian Supreme Court case of *United India Insurance Co Ltd v Santro Devi and Others* [2009] 3 MLJ 130:

> [89] The provisions of compulsory insurance have been framed to advance a social object. It is in a way part of the social justice doctrine. When a certificate of insurance is issued, in law, the insurance company is bound to reimburse the owner. There cannot be any doubt whatsoever that a contract of insurance must fulfill the statutory requirements of formation of a valid contract but in case of a third party risk, the question has to be considered from a different angle.

[38] The third party insurance scheme in Part IV of the RTA when viewed as whole is to afford protection to third party road users. As such, its provisions must, in accordance with well-settled principles, receive a broad and liberal interpretation that enhances its avowed object. This is what Lord Simon in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 referred to as the 'functional construction of a statute'. And when such a broad and liberal interpretation is adopted, it is evident that there is no necessity to import into the legislative scheme a two tier adjudication process, ie first to obtain judgment in tortious claim, and then to enforce the judgment against the insurer vide a recovery action, when such a requirement is not found in the RTA. If there was such a requirement, the legislature would have provided for it.

[39] Thus, for the courts to impose a requirement for recovery action would defeat the intent of the legislature. To that extent we adopt with approval the views expressed by the Court of Appeal in *Muniammah Muniandy*:

> [21] Nowhere does s 96(1) of the Road Transport Act 1987 say that the respondent

must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured. *Therefore, the question of the respondent having to file a recovery proceedings under s 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. In short, the respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceedings against the insurer*.

This was reaffirmed by this court in *Pacific & Orient Insurance Co Bhd v Mohamad Rafiq Muiz bin Ahmad Hanipah* (Appeal No 2 in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & other appeals*) in the following authoritative words:

There is nothing in s 96(1) to say that the third party claimant must first obtain another judgement against the insurer before he could proceed to enforce the judgement that he had earlier obtained against the insured. After all, the judgement debt of the insured becomes the judgement debt of the insurer ...

[40] This court in *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21; [2008] 6 CLJ 209 reaffirmed the fundamental rule of statutory interpretation, that is, the courts must give effect to the intent of the legislature, and that intention has to be found by an examination of the language used in the statute as a whole. When the RTA, in particular Part IV thereof is examined as a whole, it is clear that the intent of Parliament was to put in place a mandatory third party risk motor vehicle insurance scheme, by which any third party road user who has suffered death or injury occasioned by a motor vehicle user insured under the scheme would be statutorily indemnified by the insurance company issuing the policy of insurance.

[41] This legislative scheme was recognised by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v Kamacheh a/p Karuppen* [2015] 4 MLJ 218; [2015] 4 CLJ 54, where the court had adopted with approval the view expressed by S Santana Dass at p 230 of his book entitled *The Law of Motor Insurance* to the following effect:

... if a judgment has been entered against the insured/driver and he does not pay the judgment, the third party can enforce the judgment directly against the insurer under s 96 of the RTA. Section 96 allows a direct action by the third party against the insurer 'with respect to a matter which is required to be covered by a policy of insurance'. The policy must cover any liability which may be incurred by the insured arising out of the use of the motor vehicle by him.

The Court of Appeal in *Kamacheh a/p Karuppen* further held that:

The right of the respondent as a third party to approach the court for redress against the appellant, who itself is not a tortfeasor and with whom the respondent had no contractual relationship arises from statutory empowerment under s 96 of the RTA 1987. The mechanism of s 96 of the RTA 1987 operates thus: there is a statutory

obligation created by s 96 of the RTA 1987 on the part of the insurer (appellant) on being so notified on the failure of the insured to pay up the judgment sum that the insured had failed to be satisfied in favour of the third party. This duty to pay up is statutory in origin and as said earlier is an exception to the concept founded upon privity of contract.

[42] We reiterate by reference to the dicta of this court in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175 and *Pacific & Orient Insurance Co Bhd v Yeap Tick In* (Appeal No 6 in AmGeneral); read with *Malaysian Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440, that a third party victim of a road accident is not required to file separate recovery proceedings against the insurer of the vehicle-owner to recover the judgment sum ordered in the tortious action between the third party and the insured.

[43] If the insurer wishes to challenge their liability to pay on grounds that the claimant does not fall under the class of persons listed in s 91(1)(b) or that the policy of insurance is void or unenforceable, the insurer must obtain a timely declaration binding the third party in accordance to s 96(3) of the RTA before the liability judgment is entered or alternatively seek to intervene in the tortious liability suit and have the policy liability issue determined at the trial of the action. Absent that relief, the insurer's liability to pay is immediate as s 96(1) of the RTA makes it mandatory for the insurer to make payment after judgment had been obtained against the insured by the third party claimant.

[44] The statutory third party insurance scheme in Part IV of the RTA is, as stated earlier, a piece of beneficent social legislation. As such, any legitimate claim of a third party for death or injury sustained from a road accident involving a vehicle insured by an insurer must be resolved expeditiously and without the need for protracted litigation or excessive legal costs. Hence, the necessity to determine the tortious claim as well as the insurer's denial of liability, if any, without undue delay or the need for a recovery action that would add further costs and prolong the ultimate resolution of the third party's claim for compensation. Running down cases comprise the bulk of the subordinate court's civil case load, and the addition of another tier of unnecessary adjudicatory process in the form recovery action, is wholly unwarranted. The court's finite resources would be put to better use if such proceedings are done away with and the legal process is done fairly and efficiently to all parties, be it the third party victim, the insured tortfeasor or the insurance company, and ensure that justice is done.

[45] In the premise of the foregoing, we answer question 2 in the negative.

Second issue: Whether s 96(3) of the RTA provides the sole recourse to an insurer

who intends to challenge its liability under s 96(1) of the RTA?

[46] The legislative scheme in Part IV of the RTA allows, in limited circumstances, for an insurer to be absolved of its liability to pay any third party's judgment against the insured. This is statutorily provided in s 91(1) and in s 96(3) of the RTA.

[47] Section 96(3) of the RTA reads as follows:

> No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

Whilst s 91(1) of the RTA reads:

> 91 Requirements in respect of policies
>
> (1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which —
>
> (a) is issued by a person who is an authorised insurer within the meaning of this Part; and
>
> (b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:
>
> Provided that such policy shall not be required to cover —
>
> (aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
>
> (bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or
>
> (cc) any contractual liability.

[48] The appellant contends that s 96(3) of the RTA provides the sole recourse to an insurer, should they wish to avoid liability to indemnify the insured. We do not find merit in that contention. The respondent's core position is that they are not liable to pay on the sessions court judgment awarded to the appellant on grounds that the circumstances of the claim fell outside the scope of coverage defined by both the policy of insurance, and the provisions of the RTA, namely, para (d) of the Exception to Section B read together with s 91(1)(b)(bb) of the RTA.

[49] As explained earlier, if the insurer wishes to deny liability or be absolved from liability to pay any third party, the insurer can either proceed to obtain an order under s 96(3) of the RTA for a declaration that the insurance was void or unenforceable, or apply to intervene in the liability suit to have the issues that may affect the enforceability of the judgment vis a vis insurer and the third party determined there. See: *Jiwaneswary Raman v Etiqa General Takaful Bhd*; and *Tang Loon Pau & Ors v Mohd Salihin Kotni & Anor*.

[50] Hence, we are of the considered view that s 96(3) of the RTA is not the sole recourse to an insurer who wishes to avoid liability to indemnify the insured under ss 91(1) and 96(1) of the RTA.

[51] Thus, our answer to question 3 is in the negative.

Third issue: Whether in the circumstances of this case, s 91(1)(b)(bb) of the RTA operated to exclude the respondent's statutory liability under s 96(1) of the RTA?

[52] The determination of this issue would effectively answer question 1.

[53] The respondent had after receiving the s 96(2) notice and very early in the liability action, vide their solicitors Messrs CY Ong & Co, issued a notice of disclaimer dated 8 November 2018 to the insured/defendant which stated:

> Dear Madam,
>
> Re: Accident on 18.06.2015 at or near km 107.6 Lebuhraya Pagoh — Yong Peng, Arah Selatan, Johor involving motorcar No. WYC 8461 Batu Pahat Sessions Court Summons No. JC-A53KJ-173-11/2018
>
> It is provided under *Exception To Section B* of the policy of insurance issued in relation to motorcar No. WYC 8461 and effective at the time of accident that our clients BERJAYA SOMPO INSURANCE BERHAD will NOT pay for:
>
> > (d) liability to any person who is a member of Your and/or Your authorised driver's household who is a passenger in Your Vehicle unless he/she is required to be carried in or in Your Vehicle by reason of in pursuance of his/her contract of employment with You and/or Your authorised driver and his/her employer.

> Please note that in the event that your husband is successful in his claim against you in the above civil suit and in the further event that our clients BERJAYA SOMPO INSURANCE BERHAD are required to pay damages to your husband, that our clients will be seeking indemnity from you for all amounts paid by them, including interest and costs.

[54] Hence, the respondent had soon after the liability action was filed and served, taken the position that passenger liability was exempted and not covered by the policy, and thus the respondent was not liable to satisfy the sessions court judgment obtained by the third party (appellant). And further, the respondent's solicitors gave notice that in the event that they do pay on the liability judgment, the respondent would seek indemnity from the insured. The basis for the respondent taking this stand was that liability was exempted by virtue of para (d) of the Exception to Section B in the policy and further in reliance of s 91(1)(b)(bb) of the RTA. In this regard, the respondent submitted that the appellant worked for a company which was not in any way related to the insured and that there was no factual basis for a conclusion that the appellant was required to be in the vehicle by reason of his employment.

[55] Further, the respondent contended that the appellant did not purchase risk coverage for 'legal liability to passengers', or 'passenger cover'. Such coverage is optional and requires the payment of an additional premium. If additional cover is taken, this would according to the respondent, protect the policy holder from legal liability arising out of death or injury to a passenger carried in the vehicle.

[56] Additionally, the respondent submitted that the policy excluded liability for matters falling within the terms captioned 'Exceptions To Section B' (section B providing for liability to third parties). Where Exception (d) stated:

> (d) liability to any person who is a member of Your and/or Your authorised driver's household who is a passenger in Your Vehicle unless he/she is required to be carried in or in Your Vehicle by reason of in pursuance of his/her contract of employment with You and/or Your authorised driver and his/her employer.

This Exception (d) excluded liability to any person who was a member of the insured's household. The term 'household' is defined in the policy as:

> 6. Your household refers to all members of Your immediate family (ie Spouse, Children including legally adopted Children, Parents, Brother and Sister).

[57] The respondent further submitted that the appellant being the insured's spouse is such a member of her household, and any liability to the appellant would be excluded unless he was required to be carried in the vehicle by reason

of a contract of employment with the insured, or her authorised driver Masri, or the aquaculture company that employed the appellant. This, the respondent contended, was not the case.

[58] Thus, the respondent argued that unless the policy independently provided for such passenger risk to be covered by the policy, the appellant had no basis to seek satisfaction of the sessions court judgment from the respondent pursuant to ss 91(1) and 96(1) of the RTA.

[59] However, the appellant contended otherwise and argued that the Exemption to Section B of the policy was not applicable as the appellant's travel in the vehicle was not as a household member of the insured but was in fact travel in pursuance to his contract of employment with the aquaculture company. And to this end, the appellant relied on s 91(1)(b)(bb) of the RTA and several case authorities, which we shall come to shortly, to argue that the respondent had the statutory obligation to satisfy the sessions court judgment.

[60] Now, in order to disclaim liability for passenger cover for the appellant and advance their contention as regards the extent of policy coverage and exemption of passenger risk, the respondent could have:

(a) applied to intervene in the sessions court liability suit and put forth this argument on liability exclusion, and have the issue of the insurer's liability to the third party/respondent determined together with the issue of tortious liability of the insured/defendant to the appellant; or

(b) applied for declaratory relief under s 96(3) of the RTA to the effect that the policy was void and/or unenforceable in respect of any judgment that may be obtained by the appellant in the sessions court liability suit.

[61] However, the respondent chose not to do so. Instead, the issue of whether the appellant was travelling by reason of employment was raised in the pleadings of the tortious liability action and canvassed at length during trial, when in fact that was strictly not an issue between the insured and the appellant/third party. In the trial of the liability action, documents were tendered, witnesses examined and submissions made as regards this issue. It is worth noting that the solicitors acting for the insured/defendant, Messrs CY Ong & Co, who were appointed and retained by the respondent, vigorously advanced the respondent's contention of exclusion of liability under Exemption to Section B of the policy as part of the insured/defendant's case. At the same time, the law firm of Messrs CY Ong & Co separately acted for the respondent in issuing the disclaimer notice alluded to earlier.

[62] In the liability suit, the issue of whether the appellant's travel was employment related was strictly not an issue in determining negligence of the

defendants in the liability action vis a vis the appellant. The issue of employment related travel was only relevant as between the appellant and the respondent in order to determine whether the risk was covered under the policy so as to ascertain the respondent's statutory liability to pay under ss 91(1) and 96(1) of the RTA.

[63] The learned sessions court judge had considered this issue in some detail in his judgment and made a finding that the appellant was indeed a passenger travelling in the vehicle by reason of a contract of employment with the aquaculture company, and as such the injury that he sustained as a result of Masri's negligence, and the insured vicarious liability, was covered under the policy. And in coming to that decision, the learned sessions court judge had referred to the evidence adduced, and relied on the following case authorities:

(a) *Union Insurance (M) Sdn Bhd v Chan You Young* [1999] 1 MLJ 593; [1999] 2 CLJ 517 (CA);

(b) *Tirumeniyar a/l Singara Veloo v Malaysian Motor Insurance Pool* [2017] 6 MLJ 776; [2017] 8 CLJ 682 (CA);

(c) *MSIG Insurance (M) Bhd v Md Aznol Hafiz bin Amir & Ors* [2020] 8 MLJ 659; [2019] 4 CLJ 384 (HC); and

(d) *The People's Insurance Co (M) Bhd v Ting Tiew Kiong* [2017] 5 MLJ 624; [2007] 5 CLJ 225 (CA).

[64] In *The People's Insurance Co (M) Bhd v Ting Tiew Kiong* in dealing with a similar issue of passenger liability, the Court of Appeal held as follows:

> [7] It is the plaintiff's case that the policy covered the plaintiff as he was 'a passenger carried by reason of or in pursuance of contract of employment'. The defendant denied any liability and alleged that the plaintiff was, at the time of the accident, a passenger in the car of the deceased being carried therein other than by reason of or in pursuance of a contract of employment.
>
> [8] Thus, the entire action therefore turned on a sole issue, namely whether the plaintiff was a passenger in the deceased's car by reason of or in pursuance of a contract of employment. If he was, the defendant is liable to satisfy the judgment obtained by the plaintiff against the estate of the deceased. If he was not, the defendant would not be liable.
>
> [12] The learned *trial judge at the conclusion of the trial held that the plaintiff at the time of the accident was a passenger in the deceased's car by reason of or pursuant to a contract of employment*. Accordingly, he ordered that there be judgment for the plaintiff in the terms of the prayers in the plaintiff's amended writ of summons and statement of claim.
>
> [13] In this appeal, there are two aspects of the learned trial judge's decision which come under heavy criticism from the defendant. Firstly, the legal finding that the plaintiff need not work for the deceased's employer and travel in the car for the purpose. It suffice that he worked for some employer and traveled in the car

pursuant to his contract of employment with that employer. Secondly, the factual finding that the plaintiff was in fact travelling pursuant to his contract of employment.

[14] The legal finding turn entirely on the meaning of the phase '... other than a passenger carried by reason of or in pursuance of contract of employment'. As rightly pointed out by the learned trial judge, the law on passenger liability in respect of a policy of insurance having an exclusion clause with similar wordings as in the present case had been discussed in several cases. *It is settled law that the contract of employment referred to in the clause is not confined to the employment of the insured. It is also applicable to any person being carried in pursuance of a contract of employment with another employer* (see *Izzard v Universal Insurance* [1937] AC 773; *Tan Keng Hong & Anor v Fatimah binti Abdullah & Ors* [1974] 1 MLJ 156; [1974] CLJU 166 ; [1974] 1 LNS 166; *United Oriental Assurance Sdn Bhd v Lim Eng Yew* [1991] 3 MLJ 429; [1991] 3 CLJ 2418; [1991] 1 CLJ 484 and *Union Insurance Malaysia Sdn Bhd v Chan You Young* [1999] 1 MLJ 593; [1999] 2 CLJ 517). *These cases clearly demonstrate that the contract of employment referred to in the clause is not confined to the employment of the insured. It is possible for a passenger to come within this clause even if employed by a third party*.

[65] Thus, the appellant argues that the finding of the sessions court in respect of passenger liability, which was affirmed on appeal by the higher courts, is entirely correct. And in support of that stand, the appellant submits that both s 91(1)(b) proviso (bb) of the RTA and the terms of the insurance policy protect passengers injured while traveling in the insured vehicle for work purposes, ie 'by reason of or in pursuance of contract of employment'. In this regard, the sessions court confirmed the driver Masri's authorization by the insured to drive the vehicle and the appellant's employment-related travel, as well as the vicarious liability of the insured.

[66] Section 91(1)(b) proviso (bb) of the RTA falls within Part IV of the RTA and protects third party accident victims who travel in the insured motor vehicle pursuant to their contracts of employment. Therefore, any passenger travelling pursuant to his employment is intended by Parliament to be a 'third party' which the RTA protects. Therefore, since the appellant has established the fact of him travelling in the vehicle in pursuance of his contract of employment, the respondent as the insurer is bound by ss 96(1) and 91(3) of the RTA to satisfy the judgment which the appellant obtained against the insured.

[67] In this regard, we note that the learned sessions judge had correctly applied the law to the facts. The statutory provision in s 91(1)(b) proviso (bb) of the RTA is akin to a English case law precedent, namely, *Izzard v Universal Insurance Co Ltd* [1937] AC 773. The Federal Court in *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440; [2019] 10 CLJ 731 (FC), accepted the line of reasoning in *Izzard v Universal Insurance*.

Though in *Malaysian Motor Insurance Pool v Tirumeniyar Singara Veloo* the appeal centred on s 91(1)(b)(aa) of the RTA, the Federal Court also considered s 91(1)(b)(bb) of the RTA and held as follows:

> [72] Thus far all the cases we have cited in support of the interpretation of the present insurance policy dealt with what we consider actual employees of the policyholder. They concerned the contractual counterpart of s 91(1)(aa) in exception (ii). *Izzard v Universal Co Ltd* [1937] 3 All ER 79 ('*Izzard*') is an apt illustration of exception (iii) which is considered the contractual counterpart of s 91(1)(bb).
>
> [73] The facts in *Izzard*, though complicated, were shortly these (as modified from the headnotes). The assured owned a motor vehicle insured against commercial risks but not against passenger risks. The policy contained what is essentially exception (iii) of the present insurance policy which was also a reflection of s 36(1)(b)(ii) of the English Road Traffic Act 1930. That statutory provision is materially the same as our s 91(1)(bb) of the RTA.
>
> [74] The controversy arose in the following way. The assured agreed to do haulage work for a company of builders. The agreement was that the assured agreed to transport the builders from the workmen's homes on the condition that the assured was to be paid for each journey notwithstanding whether the workers were actually transported or not. It so happened that in one of those journeys, the assured met with an accident resulting in a workman's death. The widow was awarded damages against the assured resulting in his bankruptcy. The widow then made a claim for indemnity against the insurance company.
>
> [75] As is apparent from the facts, the workman was clearly not an employee of the policy holder. In this sense, the English equivalent of s 91(1)(aa) would not have been applicable. That is why the House of Lords turned their attention to our equivalent of s 91(1)(bb). The argument by the insurers was that based on the facts of this case, the phrase 'contract of employment' ought to be limited to instances where there was a contract of employment with the insured and not with some other party. Their Lordships logically rejected this view because doing so would render the distinction between the two exceptions superfluous in that there would essentially be no difference between the two provisos. To quote Lord Wright (at p 83), the distinction between what is essentially our provisos (aa) and (bb) is as follows and it warrants the most careful consideration:
>
> > It seems clear that provisos (b) and (c) (respectively and substantively Exceptions (ii) and (iii)) of the policy are intended to reproduce and follow the statutory terms. The former of these provisos seems calculated to exclude the necessity of covering claims which would fall within the Workmen's Compensation Acts, though it is true that these Acts would not embrace every case of death or injury to an employee arising out of or in the course of the employment. For instance, there might be such cases where the employee, by reason of the amount of his wages or salary, or otherwise, was outside the provisions of the Acts. It may be that, for some reason, the legislature thought that these cases were infrequent, and might be disregarded. But the second proviso is on a different footing. The general purpose of that statutory provision is to exclude from the compulsory insurance passenger risk in general with the exception in the first place of

passengers carried for hire or reward. This is the form of passenger risk which, as already explained, is offered in the respondent company's proposal form under the heading of passenger risk. It need not be further discussed here. But the meaning of the other head is that on which the dispute here has turned.

[68] Thus, the law is settled in that the term 'other than a passenger carried by reason of or in pursuance of contract of employment' found in para (d) of the Exception to Section B in the policy, which is a standard template clause found in most third party risk motor insurance policies, and a mirror reflection of the words in s 91(1)(b)(bb) of the RTA, does not merely refer to persons in the employment of the insured or the insured's authorised driver, but also to any person being carried in pursuance of a contract of employment with some other third party employer.

[69] The evidence at the sessions court in the liability suit shows clearly that the appellant was not on a frolic of his own whilst he was travelling as a passenger in the insured vehicle, nor was he out on a family trip as a member of the insured's household. To the contrary, it shows that the appellant was travelling in pursuance to his contract of employment with the aquaculture company. The learned sessions court judge stated as follows in the grounds of judgment:

> Berdasarkan kes *Union Insurance Malaysia Sdn Bhd v Chan You Young* [1999] 1 MLJ 593; [1999] 2 CLJ 517, Mahkamah Rayuan dalam mentafsirkan s 91(1)(bb) Road Transport Act 1987 (RTA) dibaca bersama s 96(1) RTA, telah menetapkan secara tetap bahawa tuntutan oleh seorang penumpang yang dibawa atas sebab atau menurut kontrak pekerjaan, terhadap pemegang polisi insurans adalah sah dan boleh dikuatkuasakan.
>
> Fakta-fakta material kes *Union Insurance Malaysia* adalah dengan kes sekarang.
>
> Dalam kes itu plaintif yang merupakan seorang penumpang di dalam motorcar kepunyaan suaminya, yang dipandu oleh anak plaintif untuk membawa plaintif ke tempat kerjanya bagi dan atas sebab atau menurut kontrak pekerjaan. Suami plaintif adalah pemegang polisi insurans dalam kes tersebut dan beliau telah memberi kebenaran kepada anaknya untuk memandu motorcar tersebut.
>
> Dalam kes tersebut, Mahkamah Rayuan telah membenarkan tuntutan plaintif terhadap suaminya dan membuat carian bahawa penanggung insurans adalah liable untuk menanggung gantirugi plaintif berdasarkan ss 91 dan 96 RTA.
>
> Kes *Union Insurance Malaysia* terpakai jika tuntutan dibuat oleh seorang penumpang yang dibawa atas sebab atau menurut kontrak pekerjaan, terhadap pemegang polisi insurans. Dari keterangan kes sekarang jelas bahawa kemalangan berlaku semasa plainitf dibawa atas sebab atau menurut kontrak pekerjaannya.
>
> Bukti ini di perolehi dari terma-terma kontrak pekerjaannya, slip-slip gaji dan dokumen-dokumen EPF menunjukkan bahawa plaintif di bawah pekerjaan majikannya, Asia Aquaculture Sdn Bhd sejak 1 Februari 1994. Emel bertarikh

dihantar oleh Chan Ju Lai dari Asia Aquaculture kepada plaintif yang mengarahkan plainitf menghadiri Urusan Audit Insurans di Hatchery syarikat tersebut.

Keterangan-keterangan lisan, daripada wakil syarikat Asia Aquaculture Sdn Bhd, Assistant Vice President, En Ho Boon Leong — yang megesahkan bahawa plaintif sememangnya diarahkan untuk ke Desaru bagi tujuan audit insurans tersebut.

Dokumen-dokumen PERKESO yang menunjukkan bahawa PERKESO telah membenarkan tuntutan plaintif (dokumen ini telah dipersetujui oleh ke semua pihak).

[70] The appellant submits that by reason of the sessions court's findings, and the active participation of the respondent in the proceeding before the sessions court, the respondent is privy to that decision and findings. Thus, the appellant contends that issue estoppel will operate, in the wider principle of res judicata as stated by this court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, to bind the respondent to these findings and act as a bar to the respondent raising the very same issue in separate proceedings. In the circumstances of the facts before us, we agree that issue of estoppel will apply.

[71] The appellant was travelling pursuant to his contract of employment with the aquaculture company at the time of the accident. Evidence relating to his employment and the directive from his employer to travel to Desaru was established. He was not a mere passenger carried in the vehicle. Hence, the appellant ought not be treated differently from any other 'third party' victim who obtains a judgment against the insured in respect of injuries sustained in a motor vehicle road accident. Thus, in the overall circumstances of this case, s 91(1)(b)(bb) of the RTA did not operate to exclude the respondent's statutory liability under s 96(1) of the RTA. Hence, the respondent is clearly liable to indemnify the insured and concomitantly pay the appellant the judgment sum in sessions court judgement.

[72] Therefore, we answer question 1 in the affirmative, that is, the protection afforded to a third party under s 96(1) of the RTA, ie 'any person' defined in s 91(1)(b) covers the exception in proviso (bb) ie any passenger who is in the vehicle by reason of a contract of employment, and applies to the appellant.

CONCLUSION

[73] In the premise of the foregoing, the appeal is allowed and the orders of the High Court dated 30 May 2021 and the Court of Appeal dated 29 August 2022 are set aside. The originating summons is dismissed. The appellant is at liberty to enforce the sessions court judgment against the respondent.

A **[74]** Costs here and below to the appellant in the sum of RM150,000 subject to allocator.

Appeal allowed; decisions of the courts below set aside; and the appellant granted liberty to enforce the sessions court's judgment against the respondent.

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Reported by Ashok Kumar

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